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No. _____

In The

Supreme Court of the United States

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Cross-Petitioners,

v.

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State violates the anti-alienation protections for pensions under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1056(d)(1), by mandating the re-allocation of ongoing pension benefits from the pensioner to his spouse through an administrative Fair Hearing to determine the pensioner's eligibility for medical assistance ("Medicaid")?

LIST OF PARTIES

Nova H. Robbins, on her own behalf and as attorney-in-fact for Robert H. Robbins, was the plaintiff (-appellant) in the courts below, and is the cross-petitioner in this Court. Barbara A. DeBuono, as Commissioner of Health of the State of New York, and Richard F. Schauseil, as Director of the Monroe County Department of Social Services, were the defendants (-appellees) in the courts below. Antonia C. Novello is now the Commissioner of Health of the State of New York, and is automatically substituted for Barbara A. DeBuono. Dr. Novello and Mr. Schauseil are the cross-respondents on this conditional cross-petition.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 218 F.3d 197 (2d Cir. 2000), and it is set forth as Appendix A to the petition in the companion case *Novello v. Robbins*, No. 00-489. The unreported decision of the United States District Court for the Western District of New York, entered on May 11, 1999, which was affirmed on the issue raised in this conditional cross-petition, is set forth as Appendix B to the petition in the companion case *Novello v. Robbins*, No. 00-489. Pursuant to Rule 12.5 of this Court this material is not reproduced again in this conditional cross-petition.

STATEMENT OF JURISDICTION

Cross-petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The judgment of the Second Circuit was entered June 30, 2000. This conditional cross-petition is timely under Rule 12.5 of this Court since it is filed within 30 days of the September 29, 2000 docketing of the Petition for Certiorari in *Novello v. Robbins*, Docket No. 00-489, seeking review of the same judgment, and in which petitioners are Dr. Novello and Mr. Schauseil, who are cross-respondents on this conditional cross-petition.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1) provides:

> (d) Assignment or alienation of plan benefits.
>
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

The federal Medicaid spousal impoverishment statute, 42 U.S.C. § 1396r-5, is set forth as Appendix C to the Petition in the companion case *Novello v. Robbins*, No. 00-489, and pursuant to Rule 12.5 of this Court is not reproduced in this conditional cross-petition.

The Department of the Treasury regulation concerning alienation of pension benefits, 26 C.F.R. § 1.401 (a)-13 (2000), provides in relevant part:

> (b) No assignment or alienation – (1) General rule. Under Section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

* * *

(c) Definition of assignment and alienation – (1) In general. For purposes of this section, the terms "assignment" and "alienation" include –

* * *

(ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

STATEMENT OF THE CASE

Robert H. Robbins, on whose behalf this conditional cross-petition is brought by his wife and attorney-in-fact, cross-petitioner Nova H. Robbins, applied for Medicaid from the Monroe County (New York) Department of Social Services ("MCDSS") to cover part of the cost of his nursing home care. In computing his eligibility, MCDSS would normally count the resources of his wife, Nova, and would determine that Robert was ineligible if Nova retained more than the "community spouse resource allowance" ("CSRA") which was then $80,760 (Pet., App. A., 5a). MCDSS would also have allowed Nova to retain a "minimum monthly maintenance needs allowance" ("MMMNA") from income in the amount of $2,019 per month (Pet., App. A, 5a).

Nova, however, had resources in her name which were $88,520.94 in excess of the CSRA, but she only had income in her own name of $830.87, substantially less than the MMMNA (Pet., App. A, 5a). In such a case, either spouse may have the CSRA increased at an administrative Fair Hearing in order for those extra resources to generate additional income to bring the income of the community spouse (Nova) up to or closer to the MMMNA. 42 U.S.C. § 1396r-5(e)(2)(C). Such a Fair Hearing would be decided by the New York State Department of Health ("DOH"), whose commissioner, Dr. Antonia Novello, is a cross-respondent on this conditional cross-petition.

However, the policy of DOH is that, before permitting any increase in the CSRA for Nova, it would re-allocate Robert's income (including his

pension from Eastman Kodak Company, which is subject to ERISA) to her. If that re-allocation brought Nova's income up to the MMMNA, as it did here, then no increase in the CSRA would be granted (Pet., App. A, 5a-6a).

Nova and Robert have alleged that this mandatory re-allocation of Robert's pension at the Fair Hearing violates the anti-alienation protections of ERISA, 29 U.S.C. § 1056(d)(1). The courts below rejected that argument (Pet., App. A., 13-15a; Pet., App. B, 25a). In particular, the United States Court of Appeals for the Second Circuit distinguished the protections afforded to Robert's pension under ERISA from the protections afforded to his Social Security benefits (Pet., App. A, 14a), which that court held were protected from such mandatory re-allocation (Pet., App. A, 15a).

The bases for jurisdiction in the court of first instance were 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

REASONS FOR GRANTING THE WRIT

I. The Decision Below is Contrary to Decisions of this Court

This case poses the question, with which lower courts have grappled with inconsistent results, of how to apply the concept that 29 U.S.C. § 1056(d)(1), the anti-alienation protection for pensions under ERISA, protects a "stream of income." *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 376 (1990). Robert Robbins, the institutionalized spouse and pensioner on whose behalf this cross-petition is brought, contends that it is precisely his monthly stream of income from his pension that is effectively diverted under New York's policy which requires that it be re-allocated to his wife Nova as part of the administrative Fair Hearing process to increase her CSRA.

ERISA provides no exception for benefits which are sought to be diverted under another federal statutory program such as Medicaid, and, in *Guidry*, this Court expressly declined to adopt such a broad exception. *Id.* at 375. It has been recognized that the CSRA increase affects the "stream of income" in Medicaid computations to increase the CSRA such as here. *O'Callaghan v. Commissioner of Social Services*, 53 Conn. App. 191, 205 (Conn. App. Ct. 1999).

The approach taken by this Court in *Guidry*, and by the other courts reaching a similar result in the restitution context, *infra*, recognizes that a constructive trust or similar device which re-directs

how the pensioner may use the pension benefits may be just as much of an alienation of plan benefits as a garnishment directed to the plan itself. This commonsense approach was surely familiar to Congress when ERISA was enacted since it is consistent with *Wissner v. Wissner*, 338 U.S. 655 (1950), in which this Court held that monthly installments from a National Service Life Insurance policy in effect were "seized" by an order that the named beneficiaries, the service member's parents, pay a portion of each installment to the service member's wife. *See also Ridgway v. Ridgway*, 454 U.S. 46 (1981)(holding that a court ordered constructive trust on military life insurance proceeds was an "attachment, levy or seizure" under 38 U.S.C. § 770(g)).

II. The Decision Below Conflicts with Decisions of at Least Two Other Circuit Courts of Appeal and Other Appellate Courts

The *Guidry* stream of income approach has been applied in three decisions in the federal courts that are inconsistent with the decision below. In *U.S. v. Smith*, 47 F.3d 681 (4th Cir. 1995), the court held that section 1056(d)(1) was violated by a district court order entered as part of a criminal plea that required the defendant to turn over to the government his entire pension each month as restitution. In *U.S. v. Jackson*, No. 99-50302, 2000 U.S. App. LEXIS 25353 (9th Cir. Oct. 12, 2000), the court reversed a district court order for $194,000 of restitution to be made within 90 days where it was clear that this represented a lump sum withdrawal to be made from a pension plan account.

Whether in a lump sum, as in *Jackson*, or regular payments, as in *Smith*, the result is the same: pension benefits are diverted from the beneficiary and this violates ERISA. While the funds in *Jackson* were still in the hands of the plan, the order which was reversed had been directed at the pensioner rather than the plan, contrary to the limitation of 26 C.F.R. § 1.401(a)-13 (2000), which was relied on by the Second Circuit (Pet., App. A, 15a n.3), that ERISA only protects against orders "enforceable against the plan."

The other closely analogous federal case is *Shinehouse v. Guerin*, 1996 U.S. Dist. LEXIS 6680 (E.D.Pa. 1996), *aff'd*, 107 F.3d 8 (3d Cir. 1997).[1] There, the court held that ERISA had been violated when checks had actually left the hands of the pension plan but were intercepted by a creditor prior to being cashed. The court considered that, under those circumstances, the funds were still in the hands of the pension plan and had been diverted before ever coming under control of the retiree, distinguishing cases holding that funds in the hands (or bank account) of the pensioner are not protected. *See, e.g., Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 55 (3d Cir. 1994). Such a redirection of pension benefits is also the result of the mandatory re-allocation of Robert's pension at the Fair Hearing.

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[1] Whether that case may be considered to be another circuit court of appeals decision in conflict with the decision below is unclear. While Third Circuit Internal Operating Procedures 5.8 and 6.2.1 (2000) limit citation and precedential value of unpublished opinions, such limitations are probably unconstitutional. *See Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000).

The decision below is thus at odds with two other circuit courts of appeals, and possibly three.

The application of *Guidry* to situations like this, where the pension funds are ordered diverted by legal process directed at the pensioner but intended to redirect the pension prior to it ever getting into the pensioner's bank account, has resulted in a number of other decisions involving court ordered restitution following or consistent with *Smith* and consistent with *Jackson*. As with *Smith* and *Jackson*, those decisions are inconsistent with the decision below, and this issue should be clarified by this Court. *See People v. Stephenson*, No. 97CA1966, 1999 Colo. App. LEXIS 238 (Colo. Ct. App. 1999) [following *Smith*]; *State v. Kenyon*, 225 Wis. 2d 657, 665 (Wis. Ct. App. 1999) [following *Smith*]; *Pomeranke v. Williamson*, 478 N.W.2d 800 (Minn. Ct. App. 1991). *But see Mannix v. Ohio Dep't of Human Services*, 134 Ohio App. 3d 594 (Ohio Ct. App. 1999) (dicta in case concerning IRA, not pension).

III. The Decision Below is Incorrect on an Important Issue of Federal Law

While the court below deferred to the Internal Revenue Service regulation concerning alienation of pension benefits, 26 C.F.R. § 1.401(a)-13 (2000), as limiting the anti-alienation protections of ERISA to "a right or interest enforceable against the plan," no such deference is warranted here. By its terms, the regulation only applies to compliance with section 401(a)(13) of the Internal Revenue Code [26 U.S.C. § 401(a)(13) (2000)], not to section 1056(d)(1) of ERISA. 26 C.F.R. § 1.401(a)-13(b)(1) (2000). When the regulation was adopted, the IRS was explicit

that the rule making was not intended to address the protections afforded under section 1056(d)(1) since the IRS had no jurisdiction to enforce that section. 43 Fed. Reg. 6942, 6942-6943 (Feb. 17, 1978).

While it is true, as the Second Circuit opinion notes, (Pet., App. A, 15a), that Reorganization Plan No. 4 of 1978, reprinted in 1978 U.S. Code Cong. & Admin. News 9814, 9815, subsequently transferred authority to issue regulations from the Secretary of Labor to the Secretary of the Treasury, that Plan said nothing about making the previously adopted IRS regulations applicable to sections of ERISA which the IRS itself stated it had not addressed. Indeed, to have done so would have made a mockery of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, particularly the requirement of section 553(c) that the agency incorporate in a rule a statement of its basis and purpose.

When the Reorganization Plan was subsequently ratified and affirmed by Pub. L. No. 98-532, 98 Stat. 2705 (1984), it merely provided that any prior action taken pursuant to the Reorganization Plan "shall be considered to have been taken pursuant to a reorganization expressly approved by Congress." All that did was to ratify and affirm acts taken by the IRS subsequent to the August 10, 1978 Reorganization Plan. That obviously had no effect on the pre-existing IRS regulation adopted February 17, 1978, six months before the reorganization.

In order for an unauthorized administrative action to be ratified by Congress, the ratifying

legislation must recognize that the regulation was not authorized to apply to a particular circumstance when enacted, and it must also expressly ratify that regulation in clear and unequivocal language. *See Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 208 (1937)(approving the "deliberate and ratifying action of Congress to ratify 'all contracts'"); *see also Greene v. McElroy*, 360 U.S. 474, 507 (1959). That was not done here, so there is no valid regulatory guidance as to the scope of section 1056(d)(1) once pension benefits have left the pension plan.

Thus, the question remains for this Court to decide whether the mandatory re-allocation of pension benefits in the Medicaid Fair Hearing is like the constructive trust in *Guidry* and *Wissner* and violates section 1056(d)(1) since it redirects those benefits from the pensioner before they ever reach his hands or bank.

CONCLUSION

For the foregoing reasons, the Conditional Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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